

**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

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<b>APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76LJ 30116423 BY MARY T. MIMNAUGH TRUST</b>	)  )	<b>PRELIMINARY DETERMINATION TO GRANT PERMIT</b>
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On March 16, 2018, The Mary T. Mimnaugh Trust (Applicant) submitted Application for Beneficial Water Use Permit No. 76LJ 30116423 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 20 gallons per minute (GPM) up to 0.78 acre-feet (AF) from Flathead Lake for the purpose of lawn & garden irrigation use. The Department published receipt of the Application on its website. The Application was amended to request a flow rate of 22.5 GPM on May 7, 2018. The Application was determined to be correct and complete as of May 9, 2018. An Environmental Assessment for this Application was completed on May 8, 2018.

**INFORMATION**

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments
- Maps showing location of parcel and planned irrigated area layout

Information received after Application Filed

- Revised application materials addressing amended flow rate, received April 26, 2018
- Application amendment amending flow rate, received May 7, 2018

### Information within the Department's Possession/Knowledge

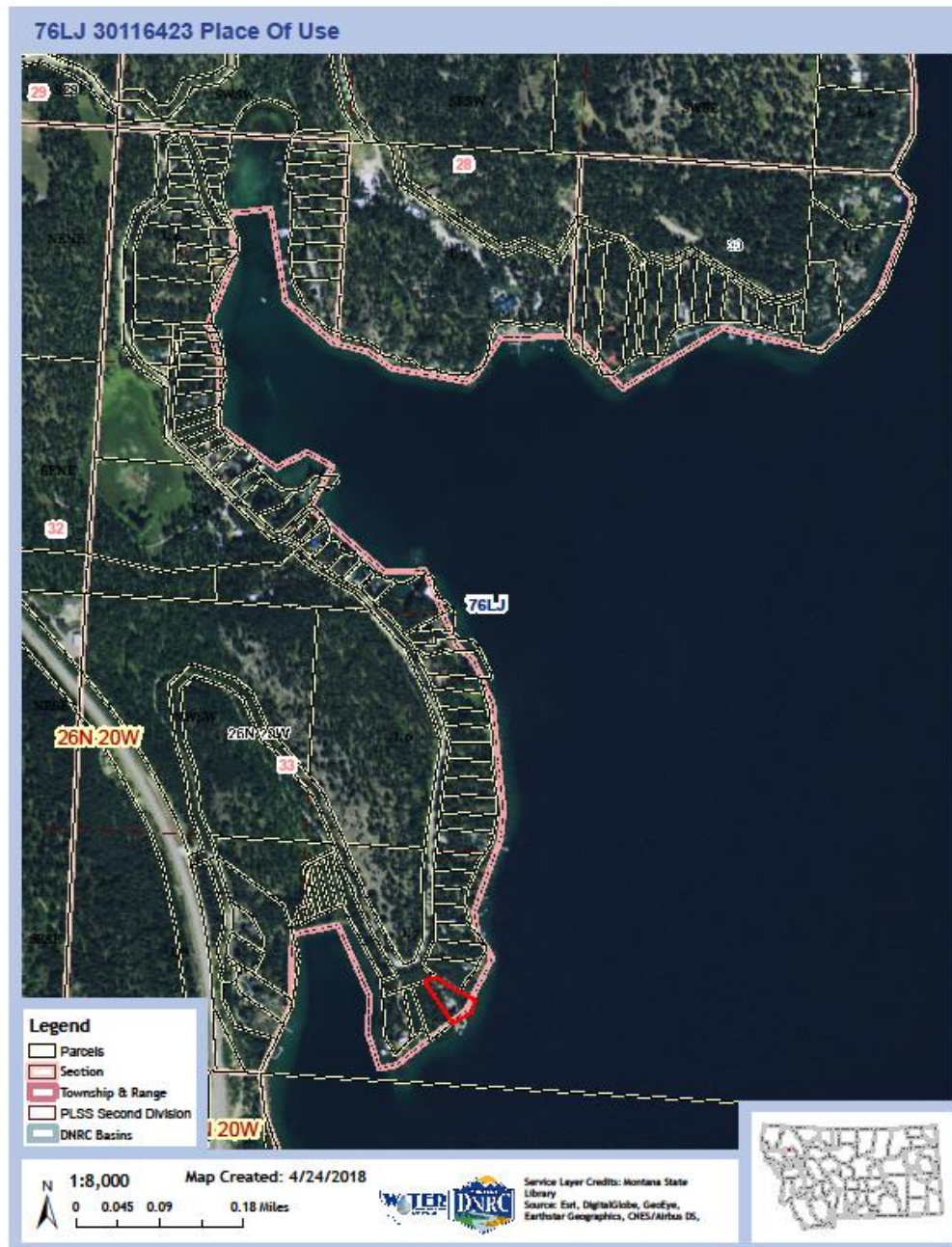
- USGS gaging station records (Station # 12372000, Flathead River near Polson, MT) from October 1938- September 2017.
- Department water right records of existing rights

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

### **PROPOSED APPROPRIATION**

#### **FINDINGS OF FACT**

1. The Applicant proposes to pump water from Flathead Lake, from April 15-October 15 at 22.5 GPM up to 0.78 AF annually, from a point in the SESESW Section 33, Township 26N, Range 20W, Flathead County, for lawn & garden irrigation use from April 15-October 15. The Applicant proposes to water 0.37 acres of lawn & garden. The place of use is located in Lot 22A of the Amended Plat of Lots 22-24, Block 1 of Crag Moor Subdivision, in the SESESW Section 33, Township 26N, Range 20W, Flathead County.



## § 85-2-311, MCA, BENEFICIAL WATER USE PERMIT CRITERIA

### GENERAL CONCLUSIONS OF LAW

Preliminary Determination to Grant  
Application for Beneficial Water Use Permit No. 76LJ 30116423.

2. The Montana Constitution expressly recognizes in relevant part that:
  - (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
  - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
  - (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

- (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
- (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

3. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

- ... the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:
  - (a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and
  - (ii) water can reasonably be considered legally available during the period in which the

applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural

resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

4. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, *In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

5. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnier (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court,

*Memorandum and Order* (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

6. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

7. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

#### **Physical Availability** **FINDINGS OF FACT**

8. The Applicant is requesting a maximum flow rate of 22.5 GPM up to 0.78 AF annually from Flathead Lake. The proposed point of diversion is located on a peninsula of Flathead Lake that creates Deep Bay on the west side of Flathead Lake, approximately four miles south of

Lakeside, MT. In order to analyze physical availability of water at the proposed point of diversion, flow measurements from USGS gage # 12372000 (Flathead River near Polson, MT) were obtained. The period of record for the gage is October 1938-September 2017. The gaging station records were used to calculate median of mean flow rates in cubic feet per second (CFS) for each month during the period of diversion as well as median of mean volumes, which were calculated by converting CFS to Acre-Feet (CFS x 1.98 (Per DNRC form 615) x days per month).

**Table 1: Median of Mean Monthly Flows and Volume Flathead River near Polson, USGS gage #12372000**

	<b>Apr</b>	<b>May</b>	<b>Jun</b>	<b>Jul</b>	<b>Aug</b>	<b>Sep</b>	<b>Oct</b>
<b>Median of Mean Flow (CFS)</b>	9450	19350	25720	12760	6263	6038	7435
<b>Median of Mean Volume (AF)</b>	561330	1187703	1527768	783209	384423	358657	456330

9. For analysis of physical availability, Department practice for a requested POD upstream of the USGS gage is to add in the flow rates and volumes of existing rights from the gage up to the proposed POD to determine physical availability. This is done to account for existing users' withdrawals on the source.

10. A list of existing water users on the Flathead River system from its confluence with Flathead Lake down to the Polson USGS gage was compiled in order to account for diversions by existing users. A copy of this list can be found in the water right file or provided upon request. The flow rate and volume of these existing rights were added to the median of mean flows and volumes calculated for the gaging station.

11. When calculating the volume appropriated by existing users on the source, irrigation and lawn/garden uses were delegated as occurring from April 1st to October 31st. All other water uses were analyzed as year-round uses. Due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion, it was assumed that the flow rate of each existing right is continuously diverted throughout each month of the period of diversion. This



assumption leads to an overestimation of existing uses from the source. The Department finds this an appropriate measure of assessing existing rights as it protects existing water users.

12. The following table shows the physical availability of water at the Applicant's requested POD.

**Table 2. Physical Availability of Water at Applicant's Requested POD**

	Apr	May	Jun	Jul	Aug	Sep	Oct
Flow (CFS)	9,622.5	19,522.5	25,892.5	12,932.5	6,435.5	6,210.5	7,607.0
Volume (AF)	571,574.6	1,198,289.1	1,538,012.6	793,794.9	395,009.0	368,901.8	466,915.7

13. The Department finds that the proposed diversion of 22.5 GPM up to 0.78 AF of volume annually is physically available from Flathead Lake.

#### CONCLUSIONS OF LAW

14. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that "there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate."

15. It is the applicant's burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-41I by Anson* (DNRC Final Order 1987)(applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

16. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

17. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 8-13)

### **Legal Availability:**

#### **FINDINGS OF FACT**

18. The area of potential impact identified for the proposed appropriation is the Flathead River system from its entrance into Flathead Lake, down to the USGS gage near Polson, MT. This area of potential impact was determined because Salish-Kootenai Dam near Polson is the control structure for Flathead Lake. The Applicant plans to divert water from Flathead Lake, which will reduce the total volume of water leaving the lake (passing over/through the dam).

19. For analysis of legal availability, Department practice for a requested POD upstream of the USGS gage is to add in the flow rates and volumes of existing rights up to the proposed POD to determine physical availability, and then subtract out all existing rights (flow and volume) within the area of potential impact to determine legal availability. For this analysis, all existing water rights within the Flathead River system from the start of Flathead Lake down to Salish-Kootenai dam where USGS gage #12372000 is located, will be subtracted from the median of mean monthly flow rates and volumes found at the requested POD in order to determine legal availability of water. Lists of the existing water rights within the Flathead River system used in this analysis can be found in the water right file.

20. When calculating legal demand volumes, irrigation and lawn/garden uses were delegated as occurring from April 1<sup>st</sup> to October 31<sup>st</sup>. This is done because all of the legal demands exist within irrigation climatic area three which has a standard period of use from April 1<sup>st</sup> to October 31<sup>st</sup>. All other water uses were analyzed as year-round uses. Due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion, it was assumed that the flow rate of each legal demand is continuously diverted throughout each month of the period of diversion. This assumption leads to an overestimation of legal demands on volume of water. The Department finds this an appropriate measure of legal demands as it protects existing water users. The Applicant is requesting a flow of 22.5 GPM up to 0.78 AF per year. The legal availability is summarized in the table below.

**Table 3. Legal availability of water on Flathead Lake down to USGS gage #12372000**

<b>Month</b>	<b>Water Physically Available (CFS)</b>	<b>Existing Legal Demands (CFS)</b>	<b>Physically Available Water minus Legal Demands (CFS)</b>	<b>Physically Available Water minus Legal Demands (AF)</b>
April	9,622.5	172.5	9,450.0	561,330.0
May	19,522.5	172.5	19,350.0	1,187,703.0
June	25,892.5	172.5	25,720.0	1,527,768.0
July	12,932.5	172.5	12,760.0	783,208.8
August	6,435.5	172.5	6,263.0	384,422.9
September	6,210.5	172.5	6,038.0	358,657.2
October	7,607.0	172.5	7,434.5	456,329.6

21. Confederated Salish & Kootenai Tribes owns the hydropower water rights for Salish-Kootenai Dam. The two claimed water rights for Salish-Kootenai Dam are for 14,540 CFS up to 614,200 AF for power generation, and a volume of 614,700 second foot days for storage for power generation which is equivalent to 1,217,106 AF. (A second foot day is the volume of water represented by a flow of 1 cubic foot per second for 24 hours. The term is used extensively as a unit of runoff volume or reservoir capacity.) The total volume from the two claimed rights is 614,200 AF plus 1,217,106 AF which equals 1,831,306 AF. Flathead Lake is managed to keep a full pool of water during the late spring and summer months. At the claimed flow rate of 14,540 CFS flowing 24 hours per day, both of the claimed water rights, the direct flow hydropower right and storage for hydropower water right, can be fulfilled over a period of 64 days.

22. Salish-Kootenai Dam operations are complex and must accommodate many management factors including, but not limited to federal licensing (Flathead Lake levels required by FERC (Federal Energy Regulatory Commission)) for fish and recreation, instream flow requirements, flood control, and irrigation needs. These factors fluctuate seasonally and from year to year. The average yearly flow of water through Flathead Lake is approximately 11,437 CFS as measured at the USGS gage at Polson (12372000), for the time period of 1939-2006 (USGS, 2009). Even though hydropower water rights at Salish-Kootenai Dam require 1,831,306 AF, to

meet the hydropower water rights claimed in the adjudication, the records show that Salish-Kootenai Dam's reservoir, Flathead Lake, consistently obtains a full pool status each year.

23. Pending an adjudication of Confederated Salish & Kootenai Tribes hydropower water rights and completion of a water availability study that shows otherwise, the Department finds that water in Flathead Lake can reasonably be considered legally available during the period in which the Applicant seeks to appropriate. This finding is based on the information and on the records of the Department and other evidence provided to the Department.

### CONCLUSIONS OF LAW

24. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

- (A) identification of physical water availability;
- (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
- (C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

25. It is the applicant's burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054

(burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005) )(it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

26. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (FOF 18-23)

### **Adverse Effect**

#### **FINDINGS OF FACT**

27. The means of diversion is a pump in Flathead Lake. In the event of a water shortage where call is made, the Applicant plans to cease pumping until water becomes available again.

28. The Department finds that there will be no adverse effect because the amount of water requested is physically and legally available on Flathead Lake at the point of diversion and the Applicant's plan to curtail their appropriation during times of water shortage is adequate.

#### **CONCLUSIONS OF LAW**

29. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

30. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. *Id.* ARM 36.12.120(8).

31. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 4.

32. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their “historic beneficial use.” *See Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston* (1991), 249 Mont. 425, 816 P.2d 1054.

33. It is the applicant’s burden to produce the required evidence. *E.g., Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (legislature has placed the burden of proof squarely on the applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. *Bostwick Properties, Inc.* ¶ 21.

34. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. *Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8.

35. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b) , MCA. (FOF 27, 28)

### **Adequate Diversion**

### FINDINGS OF FACT

36. The Applicant plans to divert water from Flathead Lake at a single diversion point using a Myers HCM150, 1.5 horsepower jet pump capable of diverting a maximum flow of 22.5 GPM to a Well X-Trol WX-302 pressure tank. The jet pump and pressure tank will be located in a concrete pump vault located approximately 3 feet above the surface of Flathead Lake. The pump performance chart provided in the application materials confirm a maximum diverted flow rate of 22.5 GPM can be supplied to the pressure tank. Water will be conveyed from the pressure tank to a total of four hydrants located on the property. Sprinklers, soaker hoses, or drip lines will be connected to the hydrants and used to irrigate the proposed area.

### CONCLUSIONS OF LAW

37. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

38. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

39. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA. (FOF 36)

### Beneficial Use

### FINDINGS OF FACT

40. The Applicant proposes to use water for the purpose of lawn & garden irrigation from April 15-October 15. Lawn & garden irrigation is recognized by the Department as a beneficial use of water. The Applicant intends to divert 0.78 AF at a flow of 22.5 GPM for irrigation of 0.37 acres of lawn & garden annually.

41. The volume required for lawn & garden irrigation of the Applicant's property was calculated using the USDA NRCS Irrigation Water Requirements (IWR) program for turf grass irrigation in conjunction with the Bigfork weather station and an application efficiency of 70%. The consumptive requirement of turf grass as identified by the IWR program is 17.61 inches of water (1.47 AF/acre) for a total consumption of 0.54 AF per annum for lawn & garden irrigation. The requested flow rate of 22.5 GPM is the maximum flow rate the pump will fill the pressure tank at based on the pump manufacturer's published specifications.
42. The Department finds that the flow rate and volume requested are reasonable and necessary for the proposed beneficial use based on design plans and system operation.

#### CONCLUSIONS OF LAW

43. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use.
44. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds, Dee Deaterly v. DNRC et al*, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).
- Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v.



Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

45. Applicant proposes to use water for lawn & garden irrigation which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence lawn & garden irrigation is a beneficial use and that 0.78 AF of diverted volume and 22.5 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 40-42)

### **Possessory Interest**

#### **FINDINGS OF FACT**

46. The Applicant signed the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

#### **CONCLUSIONS OF LAW**

47. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

48. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory

interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

49. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF 46)

### **PRELIMINARY DETERMINATION**

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 76LJ 30116423 should be GRANTED.

The Department determines the Applicant may divert water from Flathead Lake, by means of a pump, from April 15-October 15 at 22.5 GPM up to 0.78 AF, from a point in the SESESW Section 33, Township 26N, Range 20W, Flathead County, for lawn & garden irrigation use from April 15-October 15. The Applicant may irrigate 0.37 acres of lawn & garden. The place of use is located in Lot 22A of the Amended Plat of Lots 22-24, Block 1 of Crag Moor Subdivision, in the SESESW Section 33, Township 26N, Range 20W, Flathead County.

### **NOTICE**

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the

Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 17<sup>th</sup> day of May, 2018.

/Original signed by Kathy Olsen/

Kathy Olsen, Regional Manager

Kalispell Regional Office

Department of Natural Resources and Conservation

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 17<sup>th</sup> day of May, 2018, by first class United States mail.

Mary T. Mimnaugh Trust  
PO Box 248  
Lakeside, MT 59922

Core Water Consulting  
%Ray Halloran  
1075 N. Meridian Rd, Suite 2  
Kalispell, MT 59901

/Original signed by Nathaniel T. Ward/

NAME

5/17/2018

DATE